U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 28Mar2002

Case No: 2001-BLA-0804

In the Matter of:

BOONE BENTLEY (Deceased),
JUANITA BENTLEY (Widow),
Claimant,

v.

INCOAL, INC,
Employer,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest.

APPEARANCES:

Stephen A. Sanders, Esquire
For the claimant

John T. Chafin, Esquire
For the employer/carrier

BEFORE: JOSEPH E. KANE
Administrative Law Judge

DECISION AND ORDER — AWARDING BENEFITS

This proceeding arises from a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq.* (the Act). Benefits under the Act are awarded to coal miners who are totally disabled due to pneumoconiosis. Surviving

dependents of coal miners whose deaths were caused by pneumoconiosis may also recover benefits. Pneumoconiosis, commonly known as black lung, is a chronic dust disease of the lungs arising from coal mine employment. 20 C.F.R. § 718.201 (1996).

On May 21, 2001, this case was referred to the Office of Administrative Law Judges for a formal hearing. Following proper notice to all parties, a hearing was held on October 24, 2001 in Prestonsburg, Kentucky. The Director's exhibits were admitted into evidence pursuant to 20 C.F.R. § 725.456, and the parties had full opportunity to submit additional evidence and to present post-hearing briefs. Briefs on behalf of the claimant and on behalf of the employer were both received on December 26, 2001.

The Findings of Fact and Conclusions of Law that follow are based upon my analysis of the entire record, arguments of the parties, and the applicable regulations, statutes, and case law. They also are based upon my observation of the demeanor of the witness who testified at the hearing. Although perhaps not specifically mentioned in this decision, each exhibit and argument of the parties has been carefully reviewed and thoughtfully considered. While the contents of certain medical evidence may appear inconsistent with the conclusions reached herein, the appraisal of such evidence has been conducted in conformance with the quality standards of the regulations.

The Act's implementing regulations are located in Title 20 of the Code of Federal Regulations, and section numbers cited in this decision exclusively pertain to that title. References to DX, CX, and EX refer to the exhibits of the Director, claimant, and employer, respectively. The transcript of the hearing is cited as "Tr." and by page number.

ISSUES

The following issues remain for resolution:

1. the length of the miner's coal mine employment;

2. whether the miner had pneumoconiosis as defined by the Act and regulations;

3. whether the miner's pneumoconiosis arose out of coal mine employment; and

4. whether the miner's death was due to pneumoconiosis.

(DX 29; Tr. 8).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Background

Claimant, Juanita Bentley, timely filed her claim for survivor's benefits under the Act on April 19, 2000. The Office of Worker's Compensation Programs denied the claim on July 25, 2000, and, after reviewing additional evidence, affirmed its denial on January 3, 2001. Pursuant to Mrs. Bentley's request for a formal hearing, the case was transferred to the Office of Administrative Law Judges on May 21, 2001. (DX 1, 15, 25, 29).

Boone Bentley, claimant's husband and the miner upon whom this claim is based, was born on September 3, 1925 and died on February 11, 2000. Claimant and the miner were married on July 15, 1946, and they resided together until the miner's death. They had no children who were under eighteen or dependent upon them at this time this claim was filed. At the time of the hearing, Juanita Bentley resided in Wayland, Kentucky and had not remarried. (DX 1, 10; Tr. 12, 14). Mr. Bentley filed a claim for black lung benefits in July 1980. The claim was denied on September 9, 1987 and administratively closed. (DX 28-1, 28-78).

At a 1986 hearing, Mr. Bentley testified that he worked off and on in coal mines beginning at the age of seventeen. He began loading coal with a shovel into cars and spent the majority of his time as a loader. Mr. Bentley's coal mine work was performed at the face of the coal. He also worked in various other jobs, including jobs as a supply man and as a repairman. He stated that there was dust all over the mine, hanging in the air and a worker could not help but breathe it. Mr. Bentley last worked in coal mine employment in 1981 when he quit because of breathing problems and a burning in his chest. At the 1981 hearing, Mr. Bentley also testified that he began smoking cigarettes at around age fourteen, but did not remember exactly when he quit smoking. (DX 28).

Coal Mine Employment

The duration of a miner's coal mine employment is relevant to the applicability of various statutory and regulatory presumptions. Claimant bears the burden of proof in establishing the length of his coal mine work. *See Shelesky v. Director, OWCP*, 7 BLR 1-34, 1-36 (1984); *Rennie v. U.S. Steel Corp.*, 1 BLR 1-859, 1-862 (1978). At the hearing, counsel for Mrs. Bentley stated that he believed the miner had around twenty years of coal mine employment. The evidence in the record includes a Social Security Statement of Earnings encompassing the years 1942 to 1981, W-2 forms, employment history forms, applications for benefits, statements from co-workers, and claimant's testimony from a prior hearing. (DX 1-8).

The Act fails to provide specific guidelines for computing the length of a miner's coal mine work. However, the Benefits Review Board consistently has held that a reasonable method of

computation, supported by substantial evidence, is sufficient to sustain a finding concerning the length of coal mine employment. *See Croucher v. Director, OWCP*, 20 BLR 1-67, 1-72 (1996) (en banc)*; Dawson v. Old Ben Coal Co.*, 11 BLR 1-58, 1-60 (1988); *Vickery v. Director, OWCP*, 8 BLR 1-430, 1-432 (1986); *Niccoli v. Director, OWCP*, 6 BLR 1-910, 1-912 (1984). Thus, a finding concerning the length of coal mine employment may be based on many different factors, and one particular type of evidence need not be credited over another type of evidence. *Calfee v. Director, OWCP*, 8 BLR 1-7, 1-9 (1985).

In the Decision and Order on Mr. Bentley's living miner claim, Administrative Law Judge Johnson determined that the evidence established fifteen years of coal mine employment. (DX 28-78). At the hearing, counsel for the employer stipulated to that amount. (Tr. 9). In his 1987 decision, Judge Johnson found that the Social Security records showed ten years of coal mine employment. He also found that Mr. Bentley testified to other periods of coal mine employment, but his memory as to specific periods was poor and provided little basis for concrete findings. Judge Johnson gave as much credence as possible to the testimony and attributed five additional years of coal mine employment for a total of fifteen years. At the October 24, 2001 hearing, counsel for the claimant indicated that the claimant did not have any additional evidence to offer on the issue of coal mine employment. (Tr. 11). Accordingly, after reviewing the evidence of record on the issue, I agree with Judge Johnson's determinations and accept the employer's stipulation. Thus, I find that the evidence establishes fifteen years of qualifying coal mine employment.

Pneumoconiosis and Related Issues

I. Medical Evidence

A. X-Rays

Exhibit	Date of X-ray	Date of Reading	Physician/ Qualifications	Qlty.	Interpretation
DX 28-46	1-12-81	2-8-83	Quillen / BCR, B	1	0/0
DX 28-48	1-12-81	3-24-83	Wiot / BCR, B	1	0/0
DX 28-52	1-12-81	4-20-83	Spitz / BCR, B	1	0/0
DX 28-53	1-12-81	2-1-83	Pendergrass / BCR, B	1	0/0
DX 28-57	1-12-81	5-11-83	Felson	*	No evidence of pneumoconiosis

Exhibit	Date of X-ray	Date of Reading	Physician/ Qualifications	Qlty.	Interpretation
DX 28-35	1-19-81	12-16-81	Combs / BCR, B	*[1]	No evidence of pneumoconiosis
DX28-36	1-19-81	12-23-81	Quillen / BCR, B	*	0/0
DX 28-38	1-19-81	1-7-82	Wiot / BCR, B	1	0/0
DX 28-38	1-19-81	1-22-82	Felson BCR, B	*	No evidence of pneumoconiosis
DX 28-38	1-19-81	1-15-82	Proto / BCR, B	1	0/0
DX 28-26	4-10-81	4-10-81	Combs / BCR, B	*	No evidence of pneumoconiosis
DX 28-14	4-10-81	5-18-83	Cole/ BCR, B	2	negative
DX 28-41	4-14-81	2-24-83	Quillen / BCR, B	1	0/0
DX 28-43	4-14-81	2-18-83	Pendergrass / BCR, B	1	0/0
DX28-49	4-14-81	4-1-83	Wiot / BCR, B	1	0/0
DX 28-57	4-14-81	5-15-83	Spitz / BCR, B	1	0/0
DX 28-59	4-14-81	6-6-83	Proto / BCR, B	2	0/0
DX 28-62	4-14-81	6-13-83	Felson / BCR, B	*	No evidence of pneumoconiosis
DX 28-42	4-23-81	2-12-83	Quillen / BCR, B	1	0/0
DX 28-48	4-23-81	3-24-83	Wiot / BCR, B	1	0/0
DX 28-52	4-23-81	4-16-83	Spitz / BCR, B	1	0/0
DX 29-53	4-23-81	2-3-83	Pendergrass / BCR, B	1	0/0
DX 28-55	4-23-81	5-2-83	Proto / BCR, B	1	0/0
DX 28-57	4-23-81	5-11-83	Felson / BCR, B	*	No evidence of pneumoconiosis

[1] The asterisk indicates that the information was not provided in the record.

Exhibit	Date of X-ray	Date of Reading	Physician/ Qualifications	Qlty.	Interpretation
DX 28-29	5-7-81	5-7-81	Quillen / BCR, B	1	0/0
DX 28-39	5-19-81	1-22-82	Combs / BCR, B	1	0/-
DX 28-40	5-19-81	2-15-82	Quillen / BCR, B	1	0/0
DX 28-44	5-19-81	3-2-82	Wiot / BCR, B	1	0/0
DX 28-44	5-19-81	3-5-82	Spitz / BCR, B	1	0/0
DX 28-44	5-19-81	3-16-82	Proto / BCR, B	2	0/0
DX 28-15	7-27-81	8-12-81	Marshall / BCR, B	1	1/1
DX 28-16	7-27-81	7-27-81	White / BCR	1	0/0; COPD
DX 28-45	7-27-81	1-31-83	Quillen / BCR, B	*	0/0
DX 28-45	7-27-81	1-26-83	Pendergrass / BCR, B	1	0/0
DX 28-47	7-27-81	3-4-83	Wiot / BCR, B	1	0/0
DX 28-54	7-27-81	4-20-83	Felson /	*	No evidence of pneumoconiosis
DX 28-55	7-27-81	4-29-83	Proto / BCR, B	1	0/0
DX 28-50	7-27-81	4-3-83	Spitz / BCR, B	1	0/0
DX 20	10-4-99	8-1-00	Binns /	3	0/1; s/t
DX 22	12-29-99	10-23-00	Sargent / BCR, B	3	No parenchymal or pleural abnormalities consistent with pneumoconiosis
DX 22	12-10-99	10-23-00	Sargent / BCR, B	3	No parenchymal or pleural abnormalities consistent with pneumoconiosis
DX 22	9-14-99	10-23-00	Sargent / BCR, B	1	No parenchymal or pleural abnormalities consistent with pneumoconiosis
EX 1	9-14-99	7-2-01	Binns	2	0/1
EX 1	9-14-99	7-5-01	Baek	1	0/1

B. Medical Records

Mr. Bentley's medical records from Highlands Regional Medical Center were admitted as evidence in this claim. (DX 13). These records include several admissions with diagnoses including profound arterial hypoxia/respiratory failure, acute exacerbation of chronic obstructive pulmonary disease and pnemonia. A discharge summary completed by Dr. Sundaram on August 3, 1993 lists coal workers' pneumoconiosis as a discharge diagnosis. It states that chest x-rays were consistent with chronic obstructive pulmonary disease and coal workers' pneumoconiosis. Other notes list coal workers' pneumoconiosis in the past history section.

The miner's medical records from Central Baptist Hospital were submitted as evidence in this claim. (DX14). These records document various hospital admissions. The records list a history of possible or questionable coal workers' pneumoconiosis. The records indicate admissions involving the miner's end-stage chronic obstructive pulmonary disease. They also document various medical conditions and treatment and include x-rays not performed for the diagnosis of coal workers' pneumoconiosis.

Various x-ray reports from Our Lady of the Way Hospital and treatment notes from Mr. Bentley's final admission to the hospital are included in the record. (DX 21). A letter from Dr. Raghu Sundaram dated October 10, 2000 states that the physician treated Mr. Bentley on several occasions and that the miner died on February 11, 2000. Dr. Sundaram stated that Mr. Bentley worked in the coal mines for at least twelve years and that although he used to smoke one pack of cigarettes per day, the miner quit smoking twenty years prior. He indicated that Mr. Bentley had complaints of increasing shortness of breath with limited activity and increasing cough with sputum production. He indicated that Mr. Bentley was being treated with bronchodilators, home oxygen and nebulizer treatments without much relief. Dr. Sundaram concluded that the miner died due to pneumonia, respiratory distress caused by coal workers' pneumoconiosis and that the miner's death was hastened by his coal workers' pneumoconiosis. A death summary completed by Dr. Sundaram indicates that the miner had multiple problems which include chronic obstructive pulmonary disease, coal workers' pneumoconiosis, cor pulmonale, pulmonary hypertension, arteriosclerotic heart disease. He stated that blood gases were consistent with respiratory failure and chronic hypoxemia related to cor pulmonale and pulmonary hypertension.

C. Examination Reports

The record contains a deposition discussing an examination by Dr. Anderson on January 28, 1981. (DX 30-28). The physician took the miner's history and performed a physical examination, electrocardiogram, pulmonary function study, arterial blood gas study and an x-ray. He noted coal mine employment of twenty-one years and that the miner started smoking at age

fourteen, two packs per day, but quit three years prior because he couldn't breathe. Pulmonary function studies and arterial blood gas studies were within the limits of normal. Dr. Anderson interpreted a chest x-ray as positive for pneumoconiosis and diagnosed Category I pneumoconiosis. He attributed a diagnosis of pulmonary emphysema with chronic obstructive pulmonary disease to the miner's smoking history.

Dr. Allen Cornish examined Mr. Bentley on May 7, 1981 and prepared a report of his findings. (CX 28-29). Dr. Cornish noted eleven years of coal mine employment and that the miner smoked one to one and-a-half packs of cigarettes a day for twenty years, but stopped smoking in 1979. He performed a physical examination, a blood gas study which showed mild hypoxemia and a pulmonary function study which showed a mild restrictive defect. He indicated both tests provided results which were above the federal disability regulations. Dr. Cornish indicated that a chest x-ray showed no evidence of pneumoconiosis, but did show signs of pulmonary emphysema. The physician concluded that Mr. Bentley was suffering from chronic bronchitis with pulmonary obstruction and pulmonary emphysema. He indicated that he could not say whether the condition arose as a result of coal mine employment due to the miner's smoking history. Dr. Cornish was deposed regarding his examination of Mr. Bentley. (DX 28-34). He testified that he found no evidence that the miner's chronic bronchitis, pulmonary obstruction and pulmonary emphysema were related to coal mine employment. He is Board-certified in Internal medicine.

Dr. John Myers examined Mr. Bentley and prepared a report of his examination on April 23, 1981. (DX 28-28). Dr. Myers noted the miner's complaints, including shortness of breath. He noted twenty-one years of coal mine employment and a smoking history of one pack per day for around thirty-five years ending two years prior. Dr. Meyers performed a chest x-ray which he read as negative for pneumoconiosis. He also performed an electrocardiogram, pulmonary function study and an arterial blood gas study. Dr. Meyers concluded that Mr. Bentley had a significant pulmonary impairment, but that it did not appear to be due to his pneumoconiosis, and was most likely due to smoking. In a deposition, Dr. Myers testified that Mr. Bentley's diminished FEV1 value on pulmonary function tests was due to his smoking history. (DX 28-32).

Dr. Richard O'Neill performed an examination of Mr. Bentley on April 14, 1981. (DX 28-27). He noted the miner's complaints and symptoms, that he was employed as a coal miner for over twenty years and that he smoked one and-a-half packs per day for most of his adult life until quitting two to three years prior. Dr. O'Neill performed a pulmonary function study and arterial blood gas study along with a chest x-ray which he interpreted as negative, although he noted signs of questionable or suspicious coal workers' pneumoconiosis. The physician diagnosed chronic obstructive pulmonary disease, chronic bronchitis and questionable or suspicious coal workers' pneumoconiosis, stage 0/1. Dr. O'Neill testified in a deposition regarding his examination of Mr. Bentley. (DX 28--33). Dr. O'Neill attributed the miner's chronic obstructive pulmonary disease and chronic bronchitis to smoking, but admitted that part of the diseases could

be related to exposure to coal mine dust. He is Board-certified in internal medicine and practices in the areas of internal medicine and pulmonary disease.

Dr. Robert Penman testified in a deposition regarding an examination he performed of Mr. Bentley on January 19, 1981. (DX 28-25). He noted coal mine employment of twenty-one years and a prior smoking history of one pack a day for many years. He interpreted a chest x-ray as positive (1/1) for pneumoconiosis and noted that lung function tests show obstructive lung disease. He diagnosed coal workers' pneumoconiosis.

Dr. D.S. Park prepared a report of an examination he performed on Mr. Bentley on May 25, 1981. (DX 28-25) The physician noted eleven years of underground coal mine employment. He performed a physical examination and diagnosed chronic obstructive pulmonary disease.

Dr. Franklen Belhasen examined Mr. Bentley on May 10, 1983. (DX 28-58). He indicated that a chest x-ray revealed moderate fibrotic changes and classified the film as 1/1. The physician performed a pulmonary function study and an EKG. He diagnosed chronic obstructive pulmonary disease and pneumoconiosis.

The deposition of Mr. Bentley's treating physician, Dr. Raghu Sundaram, was taken and submitted into evidence in this claim. (CX 3). Dr. Sundaram testified that he practices in internal medicine with a specialty in lung disease. He is Board-Certified in Internal medicine and has two years of training in pulmonary medicine. Dr. Sundaram testified that he began treating Mr. Bentley around 1991 when the miner was hospitalized for his breathing problems. He stated that he was aware that the miner worked for a little more than ten years in the mines and that he smoked for fifteen to twenty years at the rate of around one pack per day. After Mr. Bentley's initial hospitalization, Dr. Sundaram saw the miner approximately every four to six weeks and treated him in the course of several more hospitalizations. He testified that an echo cardiogram on October 5, 1995 showed some right heart enlargement, evidencing cor pulmonale. He stated that this condition occurs whet the heart is failing because of the advanced stage of the lung process. He indicated that he is an A-reader and has training in reading x-rays and that Mr. Bentley's x-rays evidenced the disease. His diagnosis of coal workers' pneumoconiosis was based on work history, x--ray, physical findings, breathing tests, oxygen levels and visits over several years from 1991. Dr. Sundaram testified that the miner's chronic obstructive pulmonary disease was related to coal dust exposure. He determined that Mr. Bentley's death was due to complications from the lung infection in an individual with a compromised lung condition. He stated that coal dust exposure impacted on the miner's death by lowering his resistance and he could not fight the infection as normal people would. He testified his opinions would remain the same even assuming a greater smoking history. He also indicated that he agreed with the conclusions of pathologist, Dr. Green.

D. Death Certificate

Mr. Bentley's death certificate states that the miner died on February 11, 2000. The certificate lists chronic obstructive pulmonary disease as the cause of death and coal workers' pneumoconiosis, and arteriosclerotic heart disease as contributing causes of death. The death certificate was completed and signed by Dr. Raghu Sundaram. (CX 11).

E. Autopsy Reports

Dr. Sam Davis performed an examination of the miner's lungs, noting anthracotic lymph nodes and fibrosis in the lungs. (DX 24). Dr. Davis diagnosed acute bronchopneumonia, emphysema, mild interstitial fibrosis and anthracosis and anthracotic hylinized granulomata. He determined that the classic histologic features of black lung disease are not identified in the bilateral lungs. He noted that there were no discernable coal dust macules, nor was there fibrosis consistent with black lung disease.

A report from Pathology Associates was submitted as evidence. (DX 24). Dr. Henry Tazelaar reviewed autopsy slides of the miner's lungs. His final diagnosis includes severe acute bronchopneumonia with vague granulomatous features and rare giant cells with a polarizable foreign material suggestive of aspiration in a background of mild emphysema. Dr. Tazelaar also indicated that the lymph nodes show anthracosis and multiple hyalinized granulomata.

F. Autopsy Slides and Medical Review Reports

Dr. Francis Green reviewed the medical evidence of record, along with the miner's autopsy slides and prepared a report of his findings and conclusions. (CX1). Dr. Green indicated that the autopsy slides showed widespread emphysema, associated with a severe degree of chronic bronchitis. He also noted a mild simple macular pneumoconiosis, characterized by coal dust macules in the walls of respiratory bronchioles. The physician stated that some of the small airways show numerous particles with morphologies characteristic of silica and silicates in their walls. He noted that there was no evidence of nodular forms of pneumoconiosis, silicosis or progressive massive fibrosis. Dr. Green also indicated that there was widespread bronchopneumonia. Based on the autopsy slides he diagnosed moderate to severe centriacinar emphysema, severe chronic bronchitis, mild simple macular coal workers' pneumoconiosis, mineral dust associated small airways disease, aspiration pneumonia and pulmonary vascular changes consistent with pulmonary hypertension. Based on the autopsy slides and the medical evidence review, Dr. Green concluded that although the x-ray evidence was negative for pneumoconiosis, the autopsy showed evidence of the disease, and concluded that Mr. Bentley had pneumoconiosis. The

physician determined that Mr. Bentley died in respiratory failure as a result of chronic obstructive disease in combination with pneumoconiosis. He noted that although the pneumoconiosis was mild, it contributed to his death. He stated that coal mine dust is a major cause of emphysema and chronic bronchitis and these were major factors underlying his chronic obstructive pulmonary disease. Dr. Green also noted that the miner's significant smoking history contributed to the chronic bronchitis and emphysema. Dr. Green is Board-Certified in pathology. (CX 2).

Counsel for the employer deposed Dr. Green and submitted the transcript as evidence. (EX 8). Dr. Green indicated that after his report was prepared, he had the opportunity to review Dr. Branscomb's September 12, 2001 report. He indicated that his diagnosis of mild simple pneumoconiosis, which leaves room for a difference of opinions between pathologists. He also stated that one of the forms of pneumoconiosis was called small airways disease which is a subtle lesion that a lot of pathologists are not very familiar with, although it is well-described by a number of prominent pathologists. He discussed how the sample must be polarized or the silicates in the slides can be missed. He discussed the details of his diagnosis and how studies indicated that exposure to coal dust causes chronic obstructive lung disease. He indicated that depending on the varying smoking histories, the miner's emphysema was either one-third or just over one-eighth due to coal mine employment. He discussed how coal dust contributed to Mr. Bentley's pulmonary hypertension, or cor pulmonale and how the medical records supported the diagnosis. Dr. Green stated that because the condition involves the heart, it cannot be diagnosed from the lung slides, but he noticed changes in the vessels in the lungs which are evidence of cor pulmonale. He disagreed with Dr. Fino's statement that there is no increased evidence of pneumonia as a result of coal mine dust-related disease because the mechanism that causes increased pneumonia is the same whether the chronic obstructive lung disease is due to smoking or coal mine dust. Dr. Green discussed how the radiographic form of pneumoconiosis and evidence of obstructive-related lung disease are two separate diseases and one can exist without the other.

Dr. Raphael Caffrey reviewed the autopsy slides and portions of the medical evidence. (EX 3). He indicated that the lymph nodes showed a moderate amount of anthracotic pigment with micronodules which are granulomas. He noted a minimal amount of foreign material was observed under polarized light. He noted centrilobular emphysema was present and that there were no lesions of coal workers' pneumoconiosis. He diagnosed acute bronchopneumonia, centrilobular emphysema, chronic bronchitis, and lymph nodes showing a moderate amount of anthracotic pigment and hyalinized granulomata. He opined that Mr. Bentley did not have coal workers' pneumoconiosis. He indicated that for a diagnosis of pneumoconiosis, the anthracotic pigment must stimulate the production of reticilin and there must be evidence of focal emphysema, and there was evidence of neither. Because the slides did not evidence pneumoconiosis, Dr. Caffrey disagreed with Dr. Sundaram's determination that pneumoconiosis hastened the miner's death. Dr. Caffrey attributed the pulmonary disability to Mr. Bentley's smoking history.

Dr. Caffrey's deposition was submitted into evidence. (EX 7). He discussed the standards necessary for a diagnosis of pneumoconiosis. He indicated that even if it were determined that the miner had mild pneumoconiosis, it would not have hastened his death. He agreed that Mr. Bentley had chronic obstructive lung disease and that it was a factor in hastening his demise. He agreed that the risk of chronic obstructive pulmonary disease from coal dust exposure is additive to the risks of cigarette smoking. He stated that there is no specific test to determine whether the chronic obstructive pulmonary disease was partly due to coal dust exposure, but the only thing he could say was that if Mr. Bentley had never smoked, the amount of coal dust in his lungs would not have caused pulmonary disability.

G. Medical Review Reports

On September 2, 1986, Dr. Peter Tuteur reviewed the medical evidence submitted in the claim Mr. Bentley filed for benefits. (DX 28-70). Dr. Tuteur noted the miner's coal mine employment, medical and smoking histories, followed by a list of the medical evidence he reviewed. He concluded that Mr. Bentley did not have pneumoconiosis, but did have chronic bronchitis and possibly emphysema as a result of smoking.

Dr. Gregory Fino performed a review of the medical evidence in this claim and prepared a report of his findings on September 26, 2001. (EX 4). He stated that there was no doubt that Mr. Bentley had a severe obstructive ventilatory abnormality, but the autopsy did not reveal evidence of a coal mine dust-related condition. He indicated that the pattern of abnormality was consistent with cigarette-related lung disease. He state that there is no increased incidence of pneumonia as a result of coal mine dust-related disease, but that there is an increase in a smoking-related disease. He also indicated that the arterial blood gas results were typical of the studies of smokers. He concluded that there was insufficient medical evidence to justify a diagnosis of coal workers' pneumoconiosis and any disability was due to cigarette smoking. He stated that the miner's death was due to pneumonia and lung disease from cigarette smoking. He concluded that even assuming the miner had pneumoconiosis, any disability was due to cigarette smoking and coal mine dust inhalation would not have contributed to his death.

In a deposition, Dr. Fino discussed his conclusions and his subsequent review of Dr. Green's report. (EX 6). He indicated that to an extent, Dr. Green's report changed his conclusions because Dr. Green, an experienced pathologist, found mild simple macular pneumoconiosis. He stated that this information put him in a quandary because experienced pathologists at the Mayo Clinic did not describe pneumoconiosis. He indicated that this information did not change his conclusions that Mr. Bentley was totally disabled from a respiratory standpoint. Dr. Fino testified that there are factors from which it is possible to determine whether a pulmonary disability is caused by pneumoconiosis or smoking and Mr. Bentley's disability was caused by smoking. He stated that if the miner had pneumoconiosis, it caused no more than a negligible abnormality and

was not a significant contributing factor to his disability. He stated that Mr. Bentley died from severe obstructive lung disease with emphysema due to smoking, and that coal mine dust inhalation did not contribute to or hasten his death. Dr. Fino stated that, even assuming the existence of pneumoconiosis, his opinions would not change.

Dr. Ben Branscomb reviewed Mr. Bentley's medical records and prepared a report of his findings. (EX 2). He summarized the miner's coal mine employment and smoking histories, and the medical evidence. Dr. Branscomb determined that the clinical and postmortem examinations of the lungs rule out medical or clinical pneumoconiosis. He also determined that the medical evidence does not support a finding of "legal pneumoconiosis." Dr. Branscomb stated that there was no effect of coal dust that contributed to or hastened the miner's death. He determined that all the findings were consistent with chronic obstructive lung disease caused by smoking and that Mr. Bentley did not have either form of obstruction or bronchial symptoms, nor the forms of chronic obstructive lung disease that is associated with dust exposure situations. Dr. Branscomb is Board-certified in internal medicine and is experienced in the area of pulmonary disease.

Dr. Branscomb discussed his report and findings in a deposition, along with his review of Dr. Green's report. (EX 5). Dr. Branscomb indicated that he did not agree with Dr. Green's conclusions. He stated that Mr. Bentley had panlobular chronic obstructive lung disease which is not commonly caused by inhalation of coal dust, but is commonly caused by smoking. The physician stated that Mr. Bentley did not have the respiratory capacity to perform his coal mine employment, but that the disability was due to smoking. He indicated it was possible to distinguish pulmonary disability caused by smoking and coal mine dust inhalation, and that the evidence in the record supports a finding that the miner's disorder was due to smoking. Dr. Branscomb found that the miner's death was not caused or hastened by pneumoconiosis, and that even assuming simple pneumoconiosis would not change his opinion. He stated that he disagreed with Dr. Green because two other pathologists did not find the changes Dr. Green did. However, he stated that if Dr. Green is correct in his observation, he would change his diagnosis and find simple macular pneumoconiosis, but he disagreed that the amount of disease described by Dr. Green would have any significant contribution.

DISCUSSION AND APPLICABLE LAW

Because Mrs. Bentley filed her application for survivor's benefits after March 31, 1980, this claim shall be adjudicated under the regulations at 20 C.F.R. Part 718. Under this part of the regulations, claimant must establish by a preponderance of the evidence that the miner had pneumoconiosis, that his pneumoconiosis arose from coal mine employment, and that his death was due to pneumoconiosis. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88 (1993). Failure to establish any of these elements precludes entitlement to benefits.

Pneumoconiosis and Causation

Under the Act, "'pneumoconiosis' means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 30 U.S.C. § 902(b). Section 718.202(a) provides four methods for determining the existence of pneumoconiosis. Under section 718.202(a)(1), a finding of pneumoconiosis may be based upon x-ray evidence. The record contains numerous interpretations of twelve chest x-rays spanning the years between January 1981 and September 1999. Of these interpretations, only one was positive for pneumoconiosis while the overwhelming majority were negative. Because pneumoconiosis is a progressive disease, I may properly accord greater weight to the interpretations of the most recent x-rays, especially where a significant amount of time separates the newer from the older x-rays. As noted above, I also may assign heightened weight to the interpretations by physicians with superior radiological qualifications. *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc). Because the negative readings, including those of the most recent x-rays, constitute the majority of interpretations, I find that the x-ray evidence is negative for pneumoconiosis.

Under Section 718.202(a)(2), biopsy or autopsy evidence may establish pneumoconiosis. Autopsy evidence is the most reliable evidence of the existence of pneumoconiosis. *Terlip v. Director, OWCP*, 8 BLR 1-363 (1985); *see also Peabody Coal Co. v. McCandless*, 255 F.3d 465 (7th Cir. 2001). An autopsy was performed after Mr. Bentley's death and the slides were reviewed by several physicians. After carefully considering the opinions of the pathologists who reviewed the autopsy slides, I give the most weight to the opinion of Dr. Green. Dr. Green's report addresses the fact that although the x-ray evidence is negative, the autopsy slides show evidence of the disease. In his deposition, Dr. Green carefully explained how he rendered his diagnosis and how the subtle details of the disease can be missed on examination. In addition, although they did not diagnose pneumoconiosis, Dr. Davis found anthracosis and Dr. Caffrey found anthracotic pigment in Mr. Bentley's lungs. Diagnoses of pulmonary anthracosis have been held to be the equivalent of a diagnosis of pneumoconiosis. *Dagnan v. Black Diamond Coal Mining Co*., 994 F.2d 1536 (11th Cir. 1993); *Bueno v. Director, OWCP*, 7 BLR 1-337 (1984). Opinions indicating the presence of anthracotic pigment must also be considered. *Lykins v. Director, OWCP*, 819 F.2d 146 (6th Cir. 1987). I find that Dr. Green's report outweighs the reports of the other pathologists. Accordingly, I find that the autopsy evidence establishes the existence of pneumoconiosis.

Under Section 718.202(a)(3), the existence of pneumoconiosis may be established if one of the presumptions at Sections 718.304 to 718.306 applies. Section 718.304 requires x-ray, biopsy, or equivalent evidence of complicated pneumoconiosis. Because the record contains no such evidence, this presumption is unavailable. The presumptions at Sections 718.305 and 718.306 are inapplicable because they only apply to claims that were filed before January 1, 1982,

and June 30, 1982, respectively. Because none of the above presumptions applies to this claim, the evidence does not established pneumoconiosis pursuant to Section 718.202(a)(3).

Section 718.202(a)(4) provides the fourth and final way to prove that the miner had pneumoconiosis. Under this section, claimant may establish the existence of the disease if a physician exercising reasoned medical judgment, notwithstanding a negative x-ray, finds that the miner suffered from pneumoconiosis. Although the x-ray evidence is negative for pneumoconiosis, a physician's reasoned opinion may support the presence of the disease if it is supported by adequate rationale besides a positive x-ray interpretation. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 (1993); *Taylor v. Director, OWCP*, 1-22, 1-24 (1986).

I find that the reports of the physicians who examined Mr. Bentley in the early 1980's in connection with his claim for benefits at that time are entitled to less weight because these physicians examined the miner only one time and almost twenty years prior to his death. Because pneumoconiosis is a progressive disease, I give more weight to the opinions of the physicians who recently examined the miner or reviewed his most recent medical records.

I give more weight to the opinion of Mr. Bentley's treating physician, Dr. Sundaram because the record evidences the fact that the physician was more familiar with the miner's condition. *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989). The physician practices in the area of lung disease and treated Mr. Bentley specifically for his breathing problems. Dr. Sundaram treated Mr. Bentley over a span of several years. *Revnack v. Director, OWCP*, 7 BLR 1-771 (1985). He began treating Mr. Bentley-specifically his breathing problems in 1991-and continued to treat the miner on a regular basis until his death in 2000. Although his treatment notes and brief statements in the record are not thorough reports, Dr. Sundaram explained his diagnosis and treatment of Mr. Bentley in his deposition. He explained his diagnosis of pneumoconiosis as based not only on x-ray evidence, which he read himself, but also on work history, physical findings, breathing tests, oxygen levels and visits over several years. Although he may have had an inaccurate smoking history, Dr. Sundaram indicated that his conclusions would remain the same even assuming a greater smoking history.

I also give greater weight to the opinion of Dr. Green on the issue of the existence of pneumoconiosis. Dr. Green examined not only the medical records, but also the autopsy slides in making his determination. His report is well-documented and well-reasoned. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc). Even Dr. Fino, who reviewed the records on behalf of the employer, indicated that Dr. Green was an experienced pathologist and that Dr. Green's report diagnosing pneumoconiosis put him in a quandary regarding the existence of the disease. I find that the reports of the other physicians who determined that the evidence does not support finding the existence of

pneumoconiosis are outweighed by the opinions of these two physicians. Accordingly, I find that the medical opinions establish the existence of pneumoconiosis.

Although the x-ray evidence is negative for the existence of pneumoconiosis, I find that the autopsy reports and medical reports establish that Mr. Bentley suffered from pneumoconiosis. Because I have determined that Mr. Bentley has over ten years of coal mine employment, he is entitled to a rebuttable presumption that his pneumoconiosis arose from coal mine employment. *See* 20 C.F.R. § 718.203(b). This presumption may be rebutted by evidence demonstrating another cause for claimant's pneumoconiosis. The employer has proffered no evidence to show another cause for claimant's pneumoconiosis. Accordingly, I find that Mr. Bentley's pneumoconiosis arose from coal mine employment. Thus, in order to be entitled to benefits under the Act, claimant must now establish that her husband's death was due to pneumoconiosis.

Death Due to Pneumoconiosis

Under section 718.205(c), a claimant will have established death due to pneumoconiosis in any of the following circumstances: (1) where competent medical evidence establishes that the miner's death was due to pneumoconiosis; (2) where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis; or (3) where the presumption set forth at § 718.304 is applicable. As noted above, I have found that the presumption at section 718.304 is not applicable to this claim. Survivors are not eligible for benefits where the miner's death was caused by a traumatic injury or the principal cause of death was a medical condition unrelated to pneumoconiosis. 20 C.F.R. § 718.205(c)(4).

Like several other federal circuits, the United States Court of Appeals for the Sixth Circuit has interpreted "substantially contributing cause" to include a hastening of the miner's death. *Griffith v. Director, OWCP*, 49 F.3d 184, 186 (6th Cir. 1995). *See Peabody Coal Co. v. Director, OWCP*, 972 F.2d 178, 183 (7th Cir. 1992); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 980 (4th Cir. 1992) . This interpretation means that any acceleration of the miner's death that is attributable to pneumoconiosis will entitle the claimant to benefits. *Griffith*, 49 F.3d at 186.

All of the physicians who rendered opinions on the issue agree that Mr. Bentley's death was related to his respiratory condition. Drs. Sundaram and Green found evidence of cor pulmonale, which is heart disease secondary to chronic lung disease, evidencing a large degree of disability due to a respiratory impairment. See 20 C.F.R. §718.204(c)(3). However, the physicians disagree on whether pneumoconiosis played a role in contributing to the miner's pulmonary impairment and death.

On the issue of whether pneumoconiosis contributed to the miner's death in any way, I again give the greatest weight to the opinion of Dr. Sundaram, Mr. Bentley's treating physician. Dr. Sundaram treated the miner's respiratory problems over several years and was treating him at the hospital at the time of his death. I also give more weight to the opinion of Dr. Green as it is well reasoned and consistent with the medical evidence of record. He recognized that the miner's significant smoking history contributed to his pulmonary condition. Dr. Green found that while the pneumoconiosis was mild, it contributed to the miner's death and explained his reasoning on this issue. Both physicians found the miner's obstructive lung disease was related to his coal mine employment and that the weakened pulmonary condition led to pneumonia and to death.

Three physicians attributed Mr. Bentley's pulmonary disease and death entirely to smoking. Although he did not diagnose pneumoconiosis, Dr. Fino stated that even assuming the existence of the disease, it would not have been a significant contributing factor to his disability. Dr. Branscomb also did not find pneumoconiosis, but stated that the amount of disease described by Dr. Green would not have any significant contribution to the miner's disability. Dr. Caffrey also stated that if Mr. Bentley had never smoked the amount of coal dust in his lungs would not have caused pulmonary disability, but he agreed that the risk of pulmonary disease from coal dust is additive to the risks of cigarette smoking. Although these physicians characterized any impairment from pneumoconiosis as slight or non significant, "pneumoconiosis is a substantially contributing cause or factor leading to the miner's death if it serves to hasten that death in any way." *Griffith v. Director, OWCP*, 49 F.3d 184 (6th Cir. 1995). Thus, even if the impairment was minor, it would be a contributing factor in the miner's death. Thus, I find that although it was not the major contributing factor, pneumoconiosis served to hasten the miner's death, even if only in a small way.

Conclusion

In sum, I find that claimant has established the existence of pneumoconiosis arising from coal mine employment pursuant to Section 718.202(a) . I also find that claimant has established that her husband's death was due to pneumoconiosis pursuant to 718.205(c). Accordingly, Juanita Bentley is entitled to benefits.

Attorney's Fee

Claimant's counsel has thirty days to submit an application for an attorney's fee. The application shall be prepared in strict accordance with 20 C.F.R. §§ 725.365 and 725.366. The application must be served on all parties, including the claimant, and proof of service must be filed with the application. The parties are allowed thirty days following service of the application to file objections to the fee application. In the event this decision is appealed, claimant's counsel can elect to withhold the filing of his fee petition pending the appeal.

ORDER

The employer, INCOAL, Inc. is hereby ORDERED to pay the following:

To claimant, Juanita Bentley, all benefits to which she is entitled under the Act, commencing in February 2000, the month of the miner's death.

A
JOSEPH E. KANE
Administrative Law Judge

NOTICE OF APPEAL RIGHTS. Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty days from the date this decision is filed with the District Director, Office of Workers' Compensation Programs, by filing a notice of appeal with the Benefits Review Board, ATTN: Clerk of the Board, P.O. Box 37601, Washington, D.C. 20013-7601. See 20 C.F.R. § 725.478. This decision shall be final thirty days after the filing of this decision with the district director unless appeal proceedings are instituted. 20 C.F.R. § 725.479. A copy of a notice of appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits. His address is Frances Perkins Building, Room N-2117, 200 Constitution Avenue, NW, Washington, D.C. 20210.